2

Diplomatic Protection

> When a State invokes a right of a national it is obliged, in one way or another, to involve the national at the level of procedure and of any transaction that takes place.[1]

As early as 1920, when the Permanent Court of International Justice (PCIJ, Permanent Court) was being created by the Advisory Committee of Jurists, Mr. Albert de Lapradelle from France questioned the extent to which the state should protect its citizens, from a procedural standpoint. 'Should the State leave to the individual the task of pleading his own case before the Court to which he has gained access by the aid of his Government, or should the State, having taken up the case for its subject, conduct the case alone before the Court?'[2] By quoting examples, he advocated that individuals wished to take part themselves in the proceedings.[3] Later in discussions, Mr. Francis Hagerup from Norway claimed that the individual could plead before the future Permanent Court, since arbitration accepts this practice.[4]

When contemplating the role of the individual in inter-state cases before the International Court of Justice (ICJ), diplomatic protection is perhaps the first example that comes to mind. Scholarship has focused considerably on the 'humanisation' of the practice of diplomatic protection in the Court's jurisprudence, which has made great strides over the last two decades.[5] In contrast, scholarship has overlooked how the

[1] A/CN.4/484 [51].

[2] PCIJ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (16 June–24 July 1920) 211.

[3] Ibid.

[4] Ibid 213.

[5] See, for example: Sebastian tho Pesch, 'The Influence of Human Rights on Diplomatic Protection: Reviving an Old Instrument of Public International Law' in Norman Weiss and Jean-MarcThouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) 55–67; Annemarieke Vermeer-Künzli, *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument*

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individual has been *procedurally* involved in diplomatic protection proceedings. Through exploring the nature and jurisprudential evolution of diplomatic protection, I argue in this chapter that while great strides have been made to humanise the law of diplomatic protection, its practice in the courtroom is not in alignment with this as the relevant individual does not participate in proceedings. This non-alignment impacts the procedural legitimacy of the Court in two ways: democratic standards are not upheld due to the absence of injured individuals in proceedings, and technocratic expertise is harmed where their non-participation results in the absence of significant evidence.

Diplomatic protection is an avenue of redress made available to a natural or legal person who has been injured by a foreign state, carried out by that individual's state of nationality, on his or her behalf. The International Law Commission's 2006 Draft Articles on Diplomatic Protection define it as 'The invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'.[6] The ICJ specified in its very first advisory opinion that an international organisation may also claim reparations from a government that injured one of the organisation's agents.[7] However, this chapter will focus on inter-state diplomatic protection cases involving individuals who are not agents of international organisations.

While this chapter focuses on diplomatic protection in the context of judicial settlement at the ICJ, diplomatic protection may be exercised by the state using any means of pacific settlement of disputes stipulated in Article 33 of the United Nations Charter: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their

(Leiden University 2007); Vasileios Pergantis, 'Towards a "Humanisation" of Diplomatic Protection?' (2006) 66(2) *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 351; Enrico Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?' (2005) 35(1) *Netherlands Yearbook of International Law* 85; Flor de María Palaco Caballero, *La Cour Internationale de justice et la protection de l'individu* (Schulthess 2015).

[6] Draft Articles on Diplomatic Protection with Commentaries [2006] *Yearbook of the ILC*, vol II, Part Two.

[7] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

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own choice'.[8] Given the jurisdictional hurdles before the ICJ, diplomatic protection is largely non-contentious in state practice.[9]

The practice of diplomatic protection existed years before its development by the World Court and its predecessor – in fact, "ever since the existence of international relations between [states]."[10] Although the concept of governments protecting their nationals can be traced back to much earlier,[11] diplomatic protection in the modern sense of the term finds its origins in the eighteenth century through the practice of letters of reprisal.[12] It was also seen in practice through many arbitral awards, such as the 1794 Jay Treaty (United States of America vs. United Kingdom), the 1795 Spanish–United States of America (US) Commission, and a number of arbitrations.[13] However, "the basic premise of diplomatic protection is traced to Vattel",[14] who wrote in 1797:

> Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety.[15]

Diplomatic protection was also practised in certain mixed claims commissions following the First World War.[16] It is therefore no surprise that this practice was consequently concretised in the judgments of the PCIJ; it was already anticipated by the Advisory Committee when it decided to reject the *locus standi* of individuals, as examined in Chapter 1.[17] Thus, in

[8] Charter of the United Nations, 1 UNTS XVI, Article 33.
[9] Dinh Nguyen Quoc, Patrick Daillier, and Alain Pellet, *Droit international public* (6th edn, L.G.D.J 1999) 909.
[10] Vermeer-Künzli (n. 5) 1.
[11] Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Brill/Nijhoff 2001) 35.
[12] Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 48, fn. 2; Antonio Cançado Trindade, 'Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law' (1976) 12 *Revue Belge de Droit International*499.
[13] Ibid (Parlett) 50–52, 124–33.
[14] Ibid 49.
[15] Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (CUP 2011) 38. See also Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005) 82.
[16] See, for example: *Mixed Claims Commission (United States/Germany) (1 November 1923 – 30 October 1939)* (1923) (Award) (Administrative Decision II) VII RIAA 1, 26.
[17] *Procès-verbaux* (n. 2) 204–9, 211, 213, 215–16, 723. See also Spiermann (n. 15) 192.

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its lifetime of seventeen years, the PCIJ produced numerous judgments on contentious cases which were related to the diplomatic protection of individuals.[18] Others were exercised in favour of corporations (legal persons).[19] Diplomatic protection was also indirectly invoked in other judgments.[20] In comparison, the ICJ has dealt with fewer diplomatic protection cases.[21] Although this chapter focuses on diplomatic protection of the individual, certain examples of cases involving corporations will be mentioned where pertinent.

There is a manifest reason why the practice of diplomatic protection seemingly occupies more of a residual role as opposed to its principal one of the past.[22] During the Permanent Court's lifetime, the practice of diplomatic protection filled somewhat of a void in the international legal

[18] *Mavrommatis Palestine Concessions* (Judgment) [1924] PCIJ Series A, 12; *Certain German Interests in Polish Upper Silesia* (Merits) (Judgment) [1926] PCIJ Series A; *The Case of the S.S. Lotus* (Judgment) [1927] PCIJ Series A; *Serbian Loans* (Judgment) [1929] PCIJ Series A; *Brazilian Loans* (Judgment) [1929] PCIJ Series A; *Oscar Chinn* (Judgment) [1934] PCIJ Series A/B; *Pajzs, Csáky and Esterházy* (Judgment) [1936] PCIJ Series A/B; *Panevezys-Saldutiskis Railway* (Judgment) [1939] PCIJ Series A/B.

[19] *Factory at Chorzów* (Merits) (Judgment) [1928] PCIJ Series A; *Lighthouses case between France and Greece* (Judgment) [1934] PCIJ Series A/B; *Lighthouses in Crete and Samos* (Judgment) [1937] PCIJ Series A/B; *Phosphates in Morocco* (Judgment) [1938] PCIJ Series A/B; *Electricity Company of Sofia and Bulgaria* (Judgment) [1939] PCIJ Series A/B; *Société Commerciale de Belgique* (Judgment) [1939] PCIJ Series A/B.

[20] For example: *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pazmany University)* (Judgment) [1933] PCIJ Series A/B, 216, 221.

[21] *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* (Preliminary Objections) (Judgment) [1952] ICJ Rep 93; *Ambatielos case (Greece v. United Kingdom)* (Merits) (Judgment) [1953] ICJ Rep 10; *Nottebohm (Liechtenstein v. Guatemala)* (Second Phase) (Judgment) [1955] ICJ Rep 4; *Certain Norwegian Loans (France v. Norway)* (Preliminary Objections) (Judgment) [1957] ICJ Rep 9; *Interhandel (Switzerland v. United States of America)* (Preliminary Objections) (Judgment) [1959] ICJ Rep 6; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJ Rep 3; *Vienna Convention on Consular Relations (Paraguay v. United States of America)* (Order of 10 November 1998) [1998] ICJ Rep 426; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (Judgment) [1989] ICJ Rep 15; *LaGrand (Germany v. United States of America)* (Merits) (Judgment) [2001] ICJ Rep 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment) [2010] ICJ Rep 639; *Jadhav (India v. Pakistan)* (Judgment) [2019] ICJ Rep 418. Cases not brought under a diplomatic protection heading include *Arrest Warrant of 11 August 2000* (Judgment) [2002] ICJ Rep 3, [37]–[40]; *Certain Property (Liechtenstein v. Germany)* (Preliminary Objections) (Judgment) [2005] ICJ Rep 6. Cases not recognised by the Court as diplomatic protection cases include *Avena* [40].

[22] Francisco Orrego Vicuña, 'Individuals and Non-state Entities before International Courts and Tribunals' (2001) 5(1) *Max Planck Yearbook of United Nations Law Online* 59.

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system by allowing individuals to participate in it. Indeed, the practice implied, in its very essence, that the individual did not possess a legal personality of his or her own,[23] and was an object of international law or a good on which the state had a right (*jus in rem*).[24] Today, however, there are many different avenues of judicial redress for individuals directly on the international plane. Before the World Court, state litigants increasingly evade the formal channels of diplomatic protection but do claim to be acting as *parens patriae*: on behalf of their people to assert their putative private rights.[25]

This evolution may cause some to question the relevance or added value of diplomatic protection, which has arguably become gradually unbefitting with the rise of the individual as a bearer of obligations and rights under international law.[26] Despite this decline in popularity within the context of international adjudication, diplomatic protection remains one of many avenues for the individual. Further, given its rich history within the practice of the World Court, any study of this kind would be incomplete without it.

An undeniable dichotomy exists between the legal framework of diplomatic protection, unpacked in the first part of this chapter (Section 2.1), and its procedural enactment, explained in the second part (Section 2.2). To effectively describe the legal framework of diplomatic protection, I first dismantle the famous *Mavrommatis* fiction's claim that the state is the sole injured party (Section 2.1.1). I then argue that other conditions for diplomatic protection (such as nationality and the exhaustion of local remedies) and its features (such as state discretion and state responsibility), have been increasingly humanised to place emphasis on the individual. Nonetheless, the second part of this chapter points to the

[23] David Leys, 'Diplomatic Protection and Individual Rights: A Complementary Approach' (2016) 54 *Harvard International Law Journal* 2.

[24] Ibid fn. 21.

[25] For example: Colombia in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Counter-Claims) (Order of 15 November 2017) [2017] ICJ Rep 289, 303 [43]; Iran in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Press Release) [2018] 2; Azerbaijan in *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Republic of Azerbaijan v. Republic of Armenia)* (Request for the Indication of Provisional Measures of Protection) [2021] 26; Croatia in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Press Release) [2012] 1.

[26] Chittaranjan Felix Amerasinghe, *Diplomatic Protection* (OUP 2008) 74.

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dichotomy: this directly injured individual does not participate in proceedings at the Peace Palace and does no more than occasionally provide written testimony in the government's pleadings. The third and final part of this chapter will therefore provide suggestions to advocate for stronger procedural participation for the injured individual in cases of diplomatic protection at the ICJ (Section 2.3). Section 2.4 concludes.

2.1 The *Mavrommatis* Fiction: Fabrication and Humanisation

The practice of diplomatic protection at the Court hinges upon the fulfilment of three conditions: the individual must be a national of the protecting state, the individual must have exhausted domestic remedies, and an international legal norm must have been violated. This aside, diplomatic protection is governed by three features: first, diplomatic protection is the discretionary right of the state; second, it can lead to reparations under the law of state responsibility, and third (and most importantly), there is a legal fiction upon which diplomatic protection rests. Collectively, these comprise the legal framework of diplomatic protection, at the heart of which lies the *Mavrommatis* fiction.

The concept of legal fiction was born with the very idea of diplomatic protection. The *Mavrommatis Palestine Concessions (Greece v. Britain)* PCIJ judgment of 30 August 1924 was the first judgment to not only consolidate the Vattelian premise (mentioned earlier) and the concept of the legal fiction but also to lay the groundwork for the development of the doctrine of diplomatic protection.[27] This judgment was centred on a dispute between a Greek national, Euripide Mavrommatis, and the British government. Before the First World War, when Palestine was part of the Ottoman Empire, the Ottoman authorities concluded certain contracts with Mr. Mavrommatis, which granted him concessions for certain public works to be constructed in Palestine. Some years later, after the collapse of the Ottoman Empire with its defeat in 1918, the British government, acting as the Mandatory for Palestine under a Mandate negotiated with the League, granted various concessions to a third party (the Rotenberg concessions), partly overlapping those of Mr. Mavrommatis. Mr. Mavrommatis believed that the British Government and Palestine did not recognise the full extent of his rights; they had

[27] Milano (n. 5) 110.

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violated certain international legal obligations, namely, Protocol XII of the Lausanne Peace Treaty between Turkey and the Allied Powers. Eventually, the Greek government intervened and submitted the case to the PCIJ under Article 26 of the Mandate for Palestine.[28]

As Article 34 of the PCIJ Statute limited disputes before it to states alone, or members of the League, the Permanent Court explained that

> It is true that the dispute was at first between a private person and a State – i.e. between M. Mavrommatis and Great Britain. Subsequently the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. Henceforward therefore it is a dispute which may or may not fall under the jurisdiction of the Permanent Court of International Justice.[29]

It then wrote the following cardinal passage:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant.[30]

This cemented the concept in diplomatic protection today known as a legal fiction – which is also referred to as the *Mavrommatis* fiction (both terms are used interchangeably in this chapter). This fiction stipulates that the injury to the individual as a national is an injury to the state itself, and thus, the state of nationality is seizing the Court on its *own* behalf.[31] The *Mavrommatis* fiction was affirmed by the PCIJ in other cases; for example, the *Chorzów Factory* case and the *Serbian Loans* case.[32] The consequence of this *Mavrommatis* fiction is that the

[28] *Mavrommatis Palestine Concessions* (n. 18) 7.
[29] Ibid 8.
[30] Ibid 12.
[31] Amerasinghe (n. 26) 23.
[32] *Factory at Chorzów* (n. 19); *Serbian Loans* (n. 18).

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concerned private party is completely invisible to the Court. For instance, the Permanent Court stated in *Société Commerciale de Belgique* that it was not entitled to oblige the Belgian government to enter into negotiations with the Greek government 'and still less the company which is not before it'.[33] In brief, the *Mavrommatis* fiction tells us two crucial things: first, the state is defending its own right, and not the individual's right. Second, the state is the injured party in the eyes of the Court.[34]

This section argues that the legal fiction upon which the practice of diplomatic protection rests is at odds with the reality in which the individual is at the centre of the practice. It first argues that the fiction itself inaccurately portrays whose right is being invoked and whose injury is at the root of the dispute (Section 2.1.1). It then argues that the two individual-focused conditions of diplomatic protection – nationality of the individual and their exhaustion of local remedies – indicate that the individual is at the centre of the practice (Section 2.1.2). Furthermore, the more state-centred features of diplomatic protection – reparations to the state under the law of state responsibility, and state discretion – have both been recently challenged by human rights perspectives (Section 2.1.3). Both the conditions and features of diplomatic protection therefore serve to further weaken the *Mavrommatis* fiction.

2.1.1 *The* Mavrommatis *Fiction of Diplomatic Protection: Fabrication versus Reality*

A legal fiction may be defined as a claim accepted as true for legal purposes but that is, in reality, fallacious.[35] In the context of diplomatic protection, a legal fiction is applied when assessing whose right is being protected. In reality, a right of the individual has been violated. This, in turn, has left the individual injured. However, for the purposes of this practice, the state claims that it is defending its *own* right, as a result of its *own* fictive injury. This is because, during the Vattelian era in which diplomatic protection materialised, the traditional positivist doctrine was dominant, and individuals had very little to no means of accessing international justice (Section 1.1). Thus, in an era whereby individuals

[33] *Société Commerciale de Belgique* (n. 19) 177.
[34] Alain Pellet, 'The Second Death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection' (2008) 7(1) *The Law & Practice of International Courts and Tribunals* 33, 35 [3].
[35] Vermeer-Künzli (n. 5) 35–29.

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did not exist in the international legal system, their protection was guaranteed through this legal fiction.[36] With considerations of justice in mind, it arose out of the need to remedy the lack of *locus standi* of the individual on the international plane.[37] One may question to what extent this famous *Mavrommatis* maxim is still entirely valid today. The very notion may be called into question for two reasons: whose right is being invoked and whose injury is at the root of the dispute.

First, the veil has progressively been lifted to reveal that the right being invoked is predominantly the individual's as opposed to the state's. Historically, the legal fiction assumed that the state was 'in reality' exercising its own right – to demand that international law be respected towards its nationals and to act in order to enforce this right[38] – as opposed to the right of the individual.

Today, the International Law Commission (ILC), following a heated debate on this question,[39] settled for a formulation of Draft Article 2 on Diplomatic Protection that 'leave[s] open the question whether the state exercising diplomatic protection does so in its own right or that of its national – or both'.[40] Thus, the ILC's definition of diplomatic protection makes no reference to the right of the individual nor that of the state.[41] This definition was borrowed by the Court in the preliminary objections phase of the *Ahmadou Sadio Diallo* case *(Republic of Guinea v. Democratic Republic of the Congo)*, proving that the Court, too, considered this dual possibility.[42] Yet, in other instances, the Court has recognised individuals' rights in the context of diplomatic protection proceedings.[43] The premise that the real right being protected is the state's is inaccurate. In reality, the real right being protected is that of

[36] Ibid 31.
[37] Pergantis (n. 5) 371, fn. 84.
[38] Leys (n. 23) 4.
[39] A/CN.4/484 [51]; Draft Articles on Diplomatic Protection with Commentaries (n. 6) 25, commentary to Article 1; Vermeer-Künzli (n. 5) 55–57.
[40] Draft Articles on Diplomatic Protection with Commentaries (n. 6) 26, commentary to Article 1.
[41] Draft Articles on Diplomatic Protection, *Official Records of the General Assembly (2006)*, Sixty-first Session, Supplement No. 10 (A/61/10), Article 1.
[42] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections) (Judgment) [2007] ICJ Rep 582, 599 [39]. See also Luigi Condorelli, 'Protection diplomatique réussie et réparation due: une glose' in Pierre-Marie Dupuy et al (eds), *Unité et diversité du droit international: ecrits en l'honneur du Professeur Pierre-Marie Dupuy* (Nijhoff 2014) 483.
[43] *LaGrand* (n. 21) 482–83 [42], 494 [77]; *Avena* (n. 21) 35–36 [40]. See further Chapter 9.

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the individual, but, for the purposes of the fiction, the state's right is said to have been violated as well.

This is further emphasised by the condition of diplomatic protection that the minimum standard of the treatment of aliens or international human rights law must have been violated in order for the individual to request that his or her government seize the Court.[44] As the ICJ acknowledged in 2007 in the preliminary objections phase of *Diallo*, 'Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'.[45] As international human rights are individuals' rights, this serves to highlight the flaw in claiming that the state is 'in reality' exercising its own right.

The second reason why the concept of the legal fiction may be called into question pertains to its underlying assumption that in the eyes of the Court, the state is the sole injured party. The injury of the individual as the starting point is 'irrelevant', according to this maxim. However, the Court itself has slightly distanced itself from this idea in two ways. First, the Court has acknowledged an injury from the state *and* the individual in a number of cases. Indeed, a distinction has developed in the Court's jurisprudence of three types of claims: direct, indirect, or mixed. A direct claim is one in which the state has been directly injured and, therefore, has a reason distinct from the reason of its national to bring an international claim.[46] For instance, it may have suffered a moral damage (then the breach consists in conduct discriminating against individuals having its nationality) or a material damage (when the breach affects an economic interest of the state).[47] An indirect claim is one in which the individual has been principally injured, and the state only *indirectly* injured, through its national. Finally, a mixed claim is one in which the

[44] Nobuyuki Kato, 'The Role of Diplomatic Protection in the Implementation Process of Public Interests' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Ashgate 2009) 189–205.

[45] *Diallo* (n. 42) 599 [39].

[46] Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2nd edn, CUP 2004) 145–68.

[47] Giorgio Gaja, 'The Approach of the International Court of Justice to Injuries Suffered by Individuals' (2017) 103(125–30) *Boletim da Sociedade Brasileira de Direito Internacional* 571, 574.

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injury of the individual and of the state are at par.[48] In each case, the Court will determine which injury – the individual's or the state's – is preponderant and, therefore, which type of claim applies. It is important to emphasise that the test based on preponderance is an admission in itself that all claims do in fact include an injury to an individual at their core. Thus, the direct claim does not advocate that the state's injury is the exclusive one but merely that the state's injury may be greater than the existing individual's injury. In an indirect claim, the state's injury could be entirely fictitious for purposes of the practice of diplomatic protection. However, the individual's injury cannot ever be fictitious; without a *true* injury, 'in reality', a diplomatic case will not be initiated.[49]

Second, despite this practice, the Court has gone even further by admitting the sole existence of the injury of the individual and not the state in *Diallo*. In the preliminary objections phase, it relied upon the ILC's definition of diplomatic protection in its 2006 Draft Articles, which only mentions the injury of the individual and makes no reference to the injury of the state.[50] In the merits phase, it referred to 'reparation due to Guinea for the *injury suffered by Mr. Diallo*',[51] and in the compensation phase, it clarified that its 'inquiry [would] be limited to the injury resulting from the breach of Mr. Diallo's rights as an individual'.[52] No mention was made of an injury suffered by Guinea.[53]

To summarise, the *Mavrommatis* fiction is, in itself, contradictory for two principal reasons. First, it claims that a state is 'in reality' exercising its own right, while it is 'in reality' exercising the right of the individual. Second, it claims that the state is the sole injured party, while, in fact, the true required injury for a diplomatic protection case to be opened is that of the individual, while the state's is a fictitious requirement. This problem with the very concept of legal fiction already exposes that the individual is, in fact, at the forefront of diplomatic protection, contrary to

[48] Draft Articles on Diplomatic Protection with Commentaries (n. 6) 45 [10], commentary to Article 14; *Tehran Hostages* (n. 21); *Interhandel* (n. 21); *Avena* (n. 21).

[49] Giorgio Gaja, 'Quel préjudice pour un État qui exerce la protection diplomatique?' in Denis Alland et al (eds), *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy* (Brill/Nijhoff 2014) 487–93.

[50] *Diallo* (n. 42) 599 [39].

[51] *Diallo* (n. 21) 691 [161].

[52] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Compensation) (Judgment) [2012] ICJ Rep 324, 332–33 [17].

[53] Gaja (n. 47) 573.

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what was originally desired. This is further reinforced by the two conditions of diplomatic protection, which will be examined here.

2.1.2 *The Two Conditions of Diplomatic Protection: Nationality and the Exhaustion of Local Remedies*

An examination into the conditions required in the practice of diplomatic protection demonstrates that the individual is in fact the key actor in the process, serving to further weaken the *Mavrommatis* premise. The two conditions are as follows: first, the individual being protected must be a national of the protecting state; second, an individual wishing to seize an international jurisdiction through its government must have exhausted local remedies.

The first condition contradicting the *Mavrommatis* premise is that of nationality. This condition requires that the injured individual be a national of the state that will take up its claim at the ICJ. It was traditionally perceived as not only the link in the form of rights and obligations between an individual and his or her state but also the key for individuals to benefit from rights on the then state-exclusive international plane.[54] Article 3 of the ILC Draft Articles on Diplomatic Protection reads, 'The State entitled to exercise diplomatic protection is the state of nationality'.[55] The PCIJ defined the bond of nationality between the injured individual and the government as a prerequisite to the exercise of diplomatic protection in the *Panevezys-Saldutiskis Railway* case.[56]

The condition of nationality for the exercise of diplomatic protection stands in clear contradiction to the *Mavrommatis* fiction. If the practice of diplomatic protection is about the state's right 'in reality' and its injury, then why does it hinge upon the requirement of the individual's nationality? This requirement is linked to the identity of the individual who has seized the state, placing the the latter centre stage and thus weakening the fiction. The fact that the individual must be a national of that state continuously from the date of injury to the date of the official presentation of the claim is further evidence of this.[57] Without this

[54] Malcolm N. Shaw, *International Law* (9th edn, CUP 2021) Chapter 5 (Individuals); Jean Colette, *Les principes de droit des gens dans la jurisprudence de la Cour Permanente de Justice Internationale* (Berger-Levrault 1932) 43–47.
[55] Draft Articles on Diplomatic Protection (n. 41) Article 3.
[56] *Panevezys-Saldutiskis Railway* (n. 18) 16.
[57] Draft Articles on Diplomatic Protection (n. 41) Article 5(1).

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requirement, the diplomatic protection case cannot be pursued in international adjudication.

The second condition of diplomatic protection contradicting the *Mavrommatis* doctrine is the exhaustion of local remedies. This cardinal condition requires, in the words of the ICJ, that 'the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system'.[58] In other words, the individual should have sought to resolve the issue on the domestic plane before taking it to an international court. As well as being featured in international conventions[59] and codified by the ILC in both its Articles on State Responsibility[60] and on Diplomatic Protection,[61] the exhaustion of local remedies criterion has been consistently characterised as customary practice by the PCIJ and the ICJ.[62] The condition of the exhaustion of local remedies is one of the most evident examples of inconsistency with the *Mavrommatis* fiction that the state is asserting its own right. If this were so, then it is unclear why the individual must have exhausted local remedies first, in order for the state's claim to be admissible.[63] This condition underlines the central position of the individual in diplomatic protection.[64]

2.1.3 *The Two Features of Diplomatic Protection: State Discretion and State Responsibility*

The contradictions of the *Mavrommatis* fiction (Section 2.1.1), and the conditions of diplomatic protection (Section 2.1.2) point towards the key role of the individual in this context. This is further evidenced by two further features of diplomatic protection: the discretionary right of the

[58] *Interhandel* (n. 21) 27.

[59] For example: European Convention on Human Rights, 213 UNTS 221, Article 46; American Convention on Human Rights, 1144 UNTS 123, Article 35; Optional Protocol I, International Covenant on Civil and Political Rights, 999 UNTS 171, Article 5.

[60] Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries [2001] *Yearbook of the ILC,* vol II, Part Two, Article 44.

[61] Draft Articles on Diplomatic Protection (n. 41) Article 14.

[62] *Panevezys-Saldutiskis Railway* (n. 18) 18–21; *Interhandel* (n. 21) 27; *United States of America v. Italy* (n. 21) 42; *United Kingdom v. Iran* (n. 21) 101 [10]; *Ambatielos case* (n. 21) 13–14 [4]–[6]; *Diallo* (n. 21) 654–59 [32]–[49].

[63] Pergantis (n. 5) 375.

[64] Antônio Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Right* (CUP 1983).

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state to take up the individual's matter and the due reparations under state responsibility. Both features have been challenged by an increasing human rights discourse, which serves to place more emphasis on the individual's key role in the practice of diplomatic protection. They will be examined in turn.

The first feature is state discretion. The state has the discretion to decide whether to take up the individual's case, as confirmed by the PCIJ when it stated, 'It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another State'.[65] Indeed, governments have the right to protect their citizens but are not obliged to under international law. In other words, as confirmed by the Court in *Barcelona Traction*, *LaGrand* and the ILC in its Draft Articles on Diplomatic Protection, individuals are not entitled to diplomatic protection as a matter of right.[66]

This discretionary right has been perceived to stand starkly in contrast with a state's international treaty obligations to defend its nationals' human rights. It has been claimed that diplomatic protection is a legal or moral duty of the state.[67] Indeed, the Sixth Committee of the United Nations General Assembly had noted that some states enshrined in their domestic legislation that the state does indeed have an *obligation* to protect its nationals abroad: some phrased their legislation to state that the individual has a *right* to receive diplomatic protection or *is entitled* to this protection, and others *guaranteed* this protection or established that the government has a *duty*.[68] It has also been argued that a discretionary decision of the government may be reviewed by the national judiciary, which puts significant pressure on governments to respect human rights when confronted with a request for diplomatic protection.[69] It was even

[65] *Mavrommatis Palestine Concessions* (n. 18) 12.

[66] *Barcelona Traction Light and Power Company Ltd. (Belgium v. Spain)* (Second Phase) (Preliminary Objections) (Judgment) [1970] ICJ Rep 3, 44 [78]–[79]; *LaGrand* (n. 21) 492 [74]; Draft Articles on Diplomatic Protection with Commentaries (n. 6) 29, commentary to Article 2.

[67] Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (The Banks Law Publishing Co. 1915) 29. See also A/CN.4/484 [48].

[68] A/CN.4/506, 224.

[69] Vermeer-Künzli (n. 5) 182; Francisco Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000) 15(2) *ICSID Review – Foreign Investment Law Journal* 340, 346.

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proposed by former ILC Special Rapporteur John Dugard that the state's discretionary right in diplomatic protection should be limited where *jus cogens* norms have been violated.[70]

Although rejected by the ICJ in *Barcelona Traction*[71] and by the ILC,[72] the latter's Draft Article 19 reads that states should give due consideration to the possibility of exercising diplomatic protection when *a significant injury* has occurred.[73] The commentary further specifies that 'the protection of human beings by means of international law is today one of the principal goals of the international legal order',[74] and the commentary to Article 2 specifies that 'the discretionary right of a State to exercise diplomatic protection should therefore be read with Draft Article 19 which recommends to states that they should exercise that right in appropriate cases'.[75] Overall, there is a marked tension with respect to state discretion, which has been challenged by human rights claims.

The second feature of diplomatic protection that has been subject to attempts of humanisation is the practice of reparations in the context of state responsibility. Under the laws of state responsibility, the state in breach of an international legal obligation is required to make reparation.[76] The regime of state responsibility rests on traditional inter-state interactions, with the PCIJ describing it as established 'immediately as between the two States'.[77] The relationship between diplomatic protection and state responsibility reinforced the idea that the injury to the individual (as a national) is an injury to the state itself, and thus, the state of nationality is seizing the Court on its *own* behalf.

However, two elements of reparations have been challenged in the diplomatic protection context: the calculation of damages and the question of the recipient of compensation. Regarding the calculation of damages, there is now an accepted practice in the Court's jurisprudence and in customary international law of calculating damages on the basis of the injury suffered

[70] A/CN.4/506 and Add. 1, Article 4.
[71] *Barcelona Traction* (n. 66) 44 [78].
[72] A/55/10, 157–58.
[73] Draft Articles on Diplomatic Protection (n. 41) Article 19 (emphasis added).
[74] Draft Articles on Diplomatic Protection with Commentaries (n. 6) 95 [2], commentary to Article 19.
[75] Ibid 30 [3], commentary to Article 2.
[76] *Factory at Chorzów* (Jurisdiction) (Judgment) [1927] PCIJ Series A, 21.
[77] *Phosphates in Morocco* (n. 19) 28. See also *S.S. "Wimbledon"* (Judgment) [1923] PCIJ Series A, 30; *Factory at Chorzów* (n. 76) 21; *Factory at Chorzów* (n. 19) 29.

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by the individual.[78] This again emphasises the central role of the individual in diplomatic protection, contrary to the *Mavrommatis* fiction.

The second development in favour of the individual in state responsibility is the question of the recipient of the compensation. The traditional rule confirmed by the ICJ in *Diallo* and the ILC is that the state itself will receive the compensation.[79] This supports the *Mavrommatis* fiction. This, however, has been challenged by Article 19(c) of the Draft Articles on Diplomatic Protection, which recommends that states 'transfer to the injured person any compensation obtained for the injury from the responsible state subject to any reasonable deductions'.[80] While the ILC admitted that it does not constitute a settled practice, 'public policy, equity and respect for human rights support the curtailment of the state's discretion in the disbursement of compensation'.[81] The heated debates within the ILC during the drafting of the 2006 Draft Articles on Diplomatic Protection, reflecting antagonism between traditional and modern approaches, serves as evidence of the evolving nature of this practice and the erosion of the fiction that held it together.[82]

Compensation to the individual has also been challenged by the Court, who stated in *Diallo* that 'the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury'.[83] Judge Abdulqawi Yusuf has questioned whether this statement was enough, contemplating that the Court could have gone further and explicitly stated that reparations accrue to individuals in case of injury to their rights.[84] This challenged premise supports once again the natural movement away from the *Mavrommatis* fiction and the emergent position of the individual in the practice of diplomatic protection.

[78] *Factory at Chorzów* (n. 19) 28; *Barcelona Traction* (n. 66) 222–23 [3] (Separate opinion of Judge Morelli); *Diallo* (n. 52) 331 [11].

[79] *Diallo* (n. 21) 691 [161]; Draft Articles on Diplomatic Protection with Commentaries (n. 6) 97.

[80] Draft Articles on Diplomatic Protection with Commentaries (n. 6) commentary to Article 19(c). See also Article 33(2) of the ILC Draft Articles on State Responsibility.

[81] Ibid (Draft Articles on Diplomatic Protection) [8], commentary to Article 19.

[82] Vermeer-Künzli (n. 5) 55–57.

[83] *Diallo* (n. 21) 691 [161]; *Diallo* (n. 52) 344 [57] (emphasis added).

[84] Judge Abdulqawi Yusuf, 'Keynote Address' ("70 Years of the International Law Commission: Drawing a Balance for the Future" Conference, Geneva, 5 July 2018) 9 [36]. Statement available at: http://legal.un.org/ilc/sessions/70/pdfs/english/key_note_address_5july2018.pdf. See also Giorgio Gaja, 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21(1) *European Journal of International Law* 11, 12–14.

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2.2 Procedural *status quo* of Individual Participation

The traditional concept of the *Mavrommatis* fiction examined here concretely manifests itself in the Peace Palace whenever a case of diplomatic protection comes before the Court. Indeed, the state has taken up the case for its subject and thus conducts the case alone before it, as the 'sole claimant'. There is therefore a clear answer to Mr. Lapradelle's question from 1920 evoked in the opening of this chapter: the state does not authorise the individual to plead his or her own case at the ICJ. This would contradict the very essence of the *Mavrommatis* formula: that only the state may be seen. In the words of one commentator, 'I]l semble que ce soit par son absence, plutôt que par sa présence, que l'individu se distingue'.[85]

Yet, in light of the above analysis (Section 2.1), the procedural role of the state before a court could benefit from re-evaluation. The state is, in reality, mainly acting as an agent or representative for the individual's case, in response to the latter's injury and in defence of the latter's rights.[86] As one author has put it, '[L]'état ne ferait qu'exercer un droit procédural ou dit secondaire, compte tenu du fait qu'aucune violation de ses droits substantiels n'a eu lieu'.[87] The idea of the state as the individual's representative in diplomatic protection cases is not new. It has been confirmed in a number of past arbitral awards,[88] such as *William A. Parker (US) v. Mexico* (1926),[89] *Affaire Junghans* (1939),[90] and the *Grant-Smith Case (the Gin and Angostura)* (1952). In the latter case, the

[85] Bérénice Kafui Schramm, *La fiction juridique et le juge: Contribution à une autre herméneutique de la Cour internationale de justice* (Bruylant 2018) 152. Author's translation: It seems that it is by their absence, rather than their presence, that the individual distinguishes themselves.

[86] Alain Pellet, 'La seconde mort d'Euripide Mavrommatis? Notes sur le projet de la C.D.I sur la protection diplomatique' in Nicolas Angelet (ed), *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruylant 2007); August Von der Heydte, 'L'individu et les tribunaux internationaux' in *Collected Courses of the Hague Academy of International Law*, vol 107 (Brill 1962) 325–26.

[87] Schramm (n. 85) 159. Author's translation: The state would only be exercising a procedural or so-called secondary right, given that no violation of its substantive rights has occurred.

[88] Carlo Santulli, 'Entre protection diplomatique et action directe: La représentation (Éléments épars du statut international des sujets internes)' in *Le sujet en droit international* (Pedone 2005) 90–93.

[89] *William A. Parker (USA) v. United Mexican States* (1926) (Award) IV RIAA 35, 37 [2]. See also *North American Dredging Company of Texas (USA) v. United Mexican States* (1926) (Award) IV RIAA 26, 32 [19].

[90] *Affaire Junghans (deuxième partie) (Allemagne/Roumanie)* (1940) (Award) III RIAA 1883, 1888.

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arbitral tribunal described the defending government of the injured national as 'only taking a part in the international dispute as the representative *ad litem* of its national'.[91] This seems to best describe what occurs at the Peace Palace in diplomatic protection proceedings. A clear acknowledgement of this would be an evolution from the practice that *Mavrommatis* sought to establish, where states act in substitution of individuals, the latter seen as mere commodities.[92]

As it stands, however, the procedural participation of the individual has been limited to providing documentary evidence or written testimony in the form of affidavits in the state's written pleadings. There is therefore an undeniable dichotomy between the legal nature of diplomatic protection and its procedural implications for the state, on the one hand (Section 2.1), and the procedural practice of diplomatic protection, on the other hand.

First, the individual has often collaborated with the protecting state to provide documentary evidence,[93] such as annexes to one of the written pleadings,[94] additional documents (produced after the delivery of a pleading but prior to the closure of the written stage of proceedings), supplemental documents (filed at any moment under authorisation of the Court), or new documents (produced after the closure of the written stage, under the special procedure governed by Article 56 of the Rules and Practice Direction IX).

For example, under the PCIJ, Oscar Chinn provided the UK government with instrumental documents to make its case in a dispute named after him.[95] Before the ICJ, Greek shipowner Nicolas Ambatielos provided the state of Greece with documents in *Ambatielos (Greece v. United Kingdom)*.[96] The *Diallo* case indicated that an absence of such documentation by the individual could be detrimental to the outcome of the case. In that case, Guinea was representing Guinean businessman Ahmadou Sadio Diallo against the Democratic Republic of Congo (DRC), accusing the DRC of violating Diallo's human rights. Yet, Guinea was only compensated with a sum of 95,000 US dollars; 85,000 US dollars for non-material

[91] *Grant-Smith Case (the Gin and Angostura) (United Kingdom/Italy)* (1952) (Award) XIV RIAA 13, 17 [3].
[92] Schramm (n. 85) 157.
[93] International Court of Justice, Rules of Court, Article 50.
[94] Statute of the International Court of Justice, Article 43(1).
[95] *Oscar Chinn* (n. 18) 151–52.
[96] Memorial submitted on behalf of the Hellenic Government (30 August 1951) Annex A, 26; Annex B, 28; Annex C, 31; Annex D, 31; Annex F, 33; Annex H, 42; Annex J, 45.

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injury and 10,000 US dollars for material injury, in staggering contrast to the astronomical amount that Guinea had originally claimed: over 35 billion US dollars (reduced to 12 million dollars in the compensation phase) and 15 billion ZRZ (Zairean zaire).[97] The main reason for this is that Guinea was unable to provide any evidence for its claims in the compensation phase, with the Court noting this stood in 'stark contrast' to evidence brought by Guinea at an earlier stage of the case.[98] While many reasons could explain this – such as the change of legal representation in the compensation phase or a lack of resources to collect the necessary evidence – it is possible that Mr. Diallo did not cooperate in providing the necessary documentary evidence beyond what the Court already had. While unsatisfactory as a form of participation, such cooperation is significant and may have led to higher compensation to the Guinean government. This example demonstrates how the individual's participation can contribute to the Court's technocratic expertise, thereby upholding its procedural legitimacy (Section I.1.2).

The second form of procedural participation of the individual in diplomatic protection proceedings is providing affidavits as valuable annexes in the protecting state's memorial (written pleadings). This was seen in the *Avena (Mexico v. United States of America)* case where Mexico had the burden of proof to prove that individuals were Mexican and not American. It met this, *inter alia*,[99] by providing forty-two declarations – in the form of affidavits – confirming that they had not acquired US nationality.[100] Some of these individuals were still claimed by the US to be US citizens – the Court therefore asked the United States to provide evidence for its claim, but it could not.[101] The Court stated that the United States could have obtained this information from Mexico, but in the absence of this, it had failed to meet its own burden of proof.[102] The Court had also been provided with declarations from a number of the Mexican nationals concerned who attested to their never having been informed of their rights under Article 36(1)(b) of the VCCR.[103] *Avena*

[97] *Diallo* (n. 52) 344–46 [61].
[98] Ibid 340 [41].
[99] *Avena* (n. 21) [55].
[100] Ibid.
[101] Ibid [56].
[102] Ibid [57].
[103] Ibid [76]. Mexico referred to these statements from its nationals countless times in its memorial. See Memorial of Mexico (20 June 2003) fns 9, 11, 17, 21, 23, 26, 35–37, 39, 45, 47–48, 51, 54, 57, 65, 67–68, 73, 75, 80, 82, 86, 88, 90–92, 95, 97, 100–3, 107, 110, 112, 115, 118–19, 121, 150, 154, 158, 160, 162, 166–67.

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provides us with an example in which the individual played a strong indirect role in the litigation. To borrow from one commentator, 'As reflected in Mexico's inclusion in its submissions to the Court in the *Avena* case of information collected from the affected individuals, there are concrete possibilities to involve the individual rights-holders in the proceedings of the Court'.[104]

To conclude this section, the aforementioned cases illustrate the modest procedural prerogatives of injured individuals in the practice of diplomatic protection cases: they do no more than to provide documentary evidence or affidavits where required. This must be considered against the backdrop of the development of diplomatic protection in the Court's jurisprudence. There appears to be a disproportionate contrast between diplomatic protection in theory and in practice. Diplomatic protection in theory (Section 2.1), placing the individual at the centre of the practice, and diplomatic protection in practice (Section 2.2), where the individual is virtually excluded from a case that is essentially his or her own. Is it possible to bridge the gap?

2.3 'Bridging the Gap': Means to Procedurally Integrate the Injured Individual in Diplomatic Protection Proceedings

The final section of this chapter is dedicated to a discussion on how the individual may be further procedurally integrated in diplomatic protection cases at the Court. When Mr. de Lapradelle advocated that individuals wished to take part themselves in the proceedings,[105] which form could he have envisaged this participation taking?

The existence of an individual's substantive right has not always equated to a procedural prerogative to defend that right as a party in the international legal system.[106] It was also established in Chapter 1 that *locus standi* of the individual before the Court was not a reasonable option. Nonetheless, two conceivable solutions within the constraints of the Statute and the Rules of the Court come to mind.

The first is the government protecting the concerned individual to allow him or her to make a statement as part of the government's

[104] Martin Scheinin, 'The ICJ and the Individual' (2007) 9(2) *International Community Law Review* 123, 137.

[105] *Procès-verbaux* (n. 2) 211.

[106] Schramm (n. 85) 158; Maximilian Koessler, 'Government Espousal of Private Claims before International Tribunals' (1946) 13(2) *University of Chicago Law Review* 180, 189.

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delegation during its speaking time in oral proceedings. This was excellently executed in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* advisory proceedings of September 2018. While these were advisory proceedings (see Chapter 3), this measure may also be carried out in contentious proceedings, including (but not limited to) diplomatic protection cases. The Chagossians, whose rights to self-determination were at the heart of the *Chagos* advisory opinion, not only contributed to the written pleadings of the government of Mauritius[107] but were also physically present at the Peace Palace and participated in the oral pleadings within the speaking time of the delegation of Mauritius. According to Mauritius, 'We think it is appropriate that the Court should hear the voice of the Chagossians directly'.[108] A group of Chagossians thus attended the oral hearings as representatives of the Chagossian community.[109] One of them, Ms. Marie Liseby Elysé, made a statement during the speaking time of the government of Mauritius via video.[110] One of the counsels specified that '[t]he words of Madame Elysé, who sits in this Courtroom, are not offered as testimonial evidence, but simply as a member of the delegation of Mauritius – if you like – a statement of impact, what the continuation of colonialism really means for real people'.[111] The same practice was exercised in the reparation phase of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, where a video testimony from numerous victims of atrocities committed by the Ugandan army was displayed.[112]

Another solution within the constraints of the Statute and the Rules of the Court is the participation of the injured individual in oral proceedings as a witness. The *Diallo* case indicated that hearing directly from the witness may be valuable to the case – a report of Mr. Diallo's private hearing in October 2008 in the presence of Mr. Boubacar Télimélé Sylla and Mr. Aboubacar Camara was annexed to the Reply of the Republic of

[107] Written Comments of Mauritius (15 May 2018), [4.114].
[108] Verbatim record 2018/20, 71–72 [4] (Philippe Sands).
[109] Ibid 6 (Ms. Marie Suzelle Baptiste, Mr. Roger Alexis, Ms. Marie Nella Gaspard, Ms. Marie Mimose Furcy, Ms. Marie Janine Sadrien, Ms. Rosemonde Berthin, Marie Liseby Elysé).
[110] Ibid 72 [4] (Philippe Sands).
[111] Ibid.
[112] Response of the Democratic Republic of the Congo to the questions put by the Court (26 October 2018) [1.12]; Annex 1.11.

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Guinea of 19 November 2008.[113] The report of his hearing was referred to in Guinea's 2008 Reply 12 times.[114] In its compensation judgment, the Court references a statement made by Mr. Diallo during this hearing.[115]

In certain diplomatic protection cases, the individual's participation would be impossible due to death (seen, for example, in *Vienna Convention on Consular Relations* and *LaGrand*), or challenging due to the individual's status on death row (seen in *Avena*)[116] or detention (seen in *Tehran Hostages*[117] or *Jadhav*[118]). While playing a video in oral hearings might circumvent the latter challenges, the ICJ denied permission to Pakistan to play a confessional video of Kulbhushan Sudhir Jadhav during the oral hearings in the provisional measures phase of *Jadhav (India v. Pakistan)*.[119] However, there may still be added value to an individual's oral testimony in terms of democratic participation and/or technocratic expertise.

A key example of such added value can be seen in *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*. Although not formally brought to the Court under the header of diplomatic protection, the Netherlands sued Sweden for allegedly violating the 1902 Convention on the guardianship of infants by placing a Dutch child living in Sweden under a Swedish regime of protecting upbringing. Despite the Court's warning that it would not address "the proper appreciation of the grounds on which the challenged decisions are based",[120] the child's testimony could have provided insight into whether her treatment violated the Convention. Leading ICJ scholar Shabtai Rosenne opines that nothing in the pleadings indicated that the child was incapable of participating and stressed the importance of her preferences and welfare being considered in such

[113] Reply of the Republic of Guinea (19 November 2008) Annex 2.
[114] Ibid 8, 12, 13, 16, 17, 18, 44, 47, 54, 61, 63, 65, 66.
[115] *Diallo* (n. 52) 337 [31].
[116] Memorial of Mexico (20 June 2003) 1 [2].
[117] The USA explains in its Memorial that it was not even certain how many hostages there were; see Memorial of the Government of the United States of America (12 January 1980) 24, Part I, Letter C, and 133, Part II, Letter E.
[118] *Jadhav (India v. Pakistan)* (Provisional Measures) (Order of 18 May 2017) [2017] ICJ Rep 231.
[119] Verbatim record 2017/6, 10 [13] (Mohammad Faisal).
[120] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* (Judgment) [1958] ICJ Rep 55, 63.

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a case.[121] In other words, standards of democracy demanded that the child partake in proceedings.

Other similar examples formally brought to the Court under the header of diplomatic protection can also be identified: *Nottebohm (Liechtenstein v. Guatemala)*, *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

The first diplomatic protection case in which the participation of the injured individual as a witness would have been valuable was the *Nottebohm* case. Friedrich Nottebohm, a German national, was born in Germany in 1881 and moved to Guatemala in 1905, at the age of 24, where he resided and set up a business. In 1939, at the age of 58, he applied for naturalisation in Liechtenstein, where he had gone a few times to visit his brother who resided there. After having received Liechtenstein nationality in 1940, he went back to Guatemala to continue business until he was expelled as a result of war measures in 1943, at the age of 62. In 1946, he moved to Liechtenstein, and in 1951, he filed a claim at the ICJ against Guatemala through the government of Liechtenstein. One of Guatemala's two preliminary objections related to Friedrich Nottebohm's nationality: could it be relied upon to justify diplomatic protection before the Court? The Court defined nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. (. . .) The individual upon whom nationality is conferred is in fact more closely connected with the population of the state conferring nationality than with that of any other state'.[122] It ultimately concluded that this was not the case between Mr. Nottebohm and Liechtenstein and therefore judged Liechtenstein's claim as inadmissible.[123]

The difficulty comes with the assumptions made about the motives behind Mr. Nottebohm's decision to acquire Liechtensteinian nationality. The legal reasoning in this judgment is based on psychological motives that the Court did not objectively prove in at least two instances. First, the Court stated that 'there is nothing to indicate that the application for

[121] Shabtai Rosenne, 'Reflections on the Position of the Individual in Inter-state Litigation in the International Court of Justice' in Pieter Sanders (ed), *International Arbitration Liber Amicorum for Martin Domke* (Springer 1967) 240–51, 114.
[122] *Liechtenstein v. Guatemala* (n. 21) 23.
[123] Ibid 26.

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naturalisation then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country [Germany]'.[124] Judge John Read in his dissenting opinion disagrees, 'I am unable to agree that there is nothing to indicate that Mr. Nottebohm's naturalisation was motivated by a desire to break his ties with Germany. There are three facts which prove that he was determined to break his ties with Germany. The first is the fact of his application for naturalisation, the second is the taking of his oath of allegiance to Liechtenstein, and the third is his obtaining a certificate of naturalisation and a Liechtenstein passport'.[125] This is a motive that is difficult to assert without further inquiry to Mr. Nottebohm himself.

A second instance where Mr. Nottebohm's psychological motives were not objectively proven is where the Court assumed that he had no intention of residing in Liechtenstein. This was based on the fact that he moved back to Guatemala after having been naturalised in Liechtenstein and only left Guatemala because he was expelled. Although at face value, one may rapidly conclude that he had no intention to live in Liechtenstein, this is difficult to assert with confidence without inquiring the person in question. In line with this reasoning, Judge Read states, 'To begin with, Mr. Nottebohm was 58 years of age at the time-or within two years of the normal retirement age in the type of business activity in which he was engaged. The evidence shows that he was actually contemplating retirement. In October 1939 he was largely occupied with plans to save the business, but I find it hard to believe that he was not also thinking in terms of retirement and that Vaduz was in his mind'.[126] Judge Read also provides another reason as to why Mr. Nottebohm might have moved back to Guatemala: to clear his name and confront the multiple lawsuits open against him.[127] Again, these assumptions are difficult to sustain without interrogating Mr. Nottebohm.

I find myself in agreement with the dissenting opinions arguing that the Court should have stuck to an objective approach laid down by international law, as the subjective elements are difficult to prove without questioning the individual in focus. Judge *ad hoc* Paul Guggenheim, for instance, dissented that, 'In order to judge as to the bond between the State and its national, that is to say, in order to ascertain whether this bond is

[124] Ibid 25.
[125] Ibid 43 (Dissenting opinion of Judge Read).
[126] Ibid 45 (Dissenting opinion of Judge Read).
[127] Ibid.

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real and effective and not merely fictitious, international law only has regard to the external elements of legal facts to which it attaches certain consequences, without concerning itself with the mental attitude of the legal person responsible for a juridical act such as the act of naturalisation, and without considering the motives (which it is very difficult to determine), which have led the individual to apply for naturalisation'.[128] Judge Read made the same comment in his dissenting opinion.[129] Judge *ad hoc* Guggenheim added that it was sought to substitute legal considerations with 'subjective considerations such as the "genuineness of the application", "loyalty to the new State", "creation of a centre of economic interests in the new State", "the intention to become integrated in the national community"; or, again, rules (. . .) which are in no way in accordance with present international practice, or vague principles (. . .) which would open the door to arbitrary decisions'.[130]

Ideally, however, Mr. Nottebohm's motives could have been more credibly clarified with his participation in oral proceedings in the form of a witness, questioned by the judges and counsel. This would have demonstrated the Court's technocratic expertise – its specialised understanding of the complex facts at hand and its efforts to address them carefully. The impact would have enhanced the Court's procedural legitimacy in this instance. Rosenne supported this view, arguing that '[t]his case required some – indeed considerable – investigation not merely of the actions of the individual concerned, but more significantly of his motives, that is of psychological factors to necessarily present in the record. . .'[131] There are indications that this may have indeed occured: although this is not evidenced by archives, the Court mentioned that 'other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala',[132] and Rosenne observed that 'the ICJ accurately evaluated those actions and motives so that no practical injustice issues from the fact that in this case the individual was not able to present himself before the Court'.[133]

The second case in which the participation of the relevant individual as a witness would have been valuable is *Vienna Convention on Consular*

[128] Ibid 52–53 (Dissenting opinion of Judge *ad hoc* Guggenheim).
[129] Ibid 42 (Dissenting opinion of Judge Read).
[130] Ibid 55–56 (Dissenting opinion of Judge *ad hoc* Guggenheim).
[131] Rosenne (n. 122) 113–14.
[132] *Liechtenstein v. Guatemala* (n. 21) 26.
[133] Rosenne (n. 122) 114.

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Relations (Paraguay v. United States of America). In a separate document that Paraguay filed along with its Memorial on the merits, entitled 'Conditional request of Paraguay for an order Conclusively established facts' (9 October 1998), Paraguay argued that the United States's disregard for the Court's provisional measures order cost Paraguay its 'principal source of evidence (. . .) Mr. Breard himself', causing it to suffer 'evidentiary prejudice'.[134] This was reiterated in Paraguay's Memorial as well.[135] Through this 'Conditional request', Paraguay appealed to the Court to declare that any disputed issues of fact that are material to Paraguay's claims as to which Mr. Breard's testimony would have been relevant, be established in Paraguay's favour.[136] More significantly, Paraguay claimed reparation from the United States, requesting the Court to issue an order protecting Paraguay from evidentiary prejudice suffered from the absence of Mr. Breard's testimony.[137] As the proceedings were discontinued, the Court was not able to act on this request. However, it demonstrates the importance of the injured individual's participation and testimony in cases that directly concern him or her. Beard's participation would have allowed Paraguay to provide more accurate information to better address the legal matters under consideration and thereby evidence the Court's legitimacy through its technocratic expertise.

The third diplomatic protection case whereby the injured individual's participation in proceedings as a witness would have been desirable is the *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* case. As aforementioned (Section 2.1.3), very little compensation was received in the compensation phase due to a lack of evidence concerning the material injury incurred by the victim. Although the Republic of Guinea advocated that 'Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC',[138] the Court noted that no evidence for this had been provided by the Applicant.[139] It therefore resorted to 'equitable considerations' to make its decision on Mr. Diallo's

[134] Conditional request of Paraguay for an order conclusively established facts (9 October 1998) [1] and [6].
[135] Memorial of the Republic of Paraguay (9 October 1998) [4.29].
[136] Conditional request of Paraguay (n. 134) [3].
[137] Ibid [6] and [14].
[138] *Diallo* (n. 52) 333 [18].
[139] Ibid [19].

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non-material injury, without the need for proof. Many human rights courts take this approach (as many forms of non-pecuniary damage are, by their nature, not amenable to proof).[140] Therefore, Mr. Diallo's testimony would not have impacted the Court's determination of his non-material injury. However, in the merits phase, testimony from Mr. Diallo under the procedural guise of a witness may have been useful in the ascertainment of certain facts with regard to the violations of his human rights. Greater accuracy would have underscored the Court's technocratic expertise in this respect and, therefore, the procedural legitimacy in this dispute. While Rosenne suggested that in some instances, the presence of a concerned individual may be redundant,[141] an appearance in person would have allowed him to clarify certain potentially abstruse elements in the written pleadings, allowed him to provide his version of events, allowed counsel to cross-examine him for truthfulness, and allowed for judges to ask him questions. Furthermore, the idea of a case surrounding an individual to be decided in his or her absence is somewhat disquieting, harming democratic standards of procedural legitimacy supported by social idealism.

2.4 Conclusion

Professor Rosenne has accurately written as follows:

> In [a diplomatic protection case] the individual concerned, whatever may have been his actions, his conceptions, his expectations, or his intentions in regard to the transaction under discussion apparently is not granted any opportunity to make known to the Court, in his own way, his own views on the questions of fact and the questions of law involved. In all of these respects, it is entirely a matter for the government which has espoused his claim to decide whether or not, or to what extent, it will include its own presentation of its own case (which may or may not be the same as that of the individual) argument presented to it by the individual. The government is the *dominus litis*, and in most cases in fact also.[142]

Diplomatic protection cases are *prima facie* inter-state cases like any other at the World Court. But a closer look demonstrates that they are,

[140] See, for example, from the European Court of Human Rights: *Peck v. United Kingdom* App no 44647/98 (ECHR, 28 January 2013) [118]; *Gridin v. Russia* App no 4171/04 (ECHR, 1 June 2006) [20]; *Firstov v. Russia* App no 42119/04 (ECHR, 20 February 2014) [49].

[141] Rosenne (n. 122) 115.

[142] Ibid 112.

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in fact, disguised disputes between an individual and a foreign state. Indeed, the individual is no longer invisible on the international plane – they have recognised rights and injuries and must fulfil certain conditions in order for the Court to take up the case, through the façade of their government. This reality is coupled with an increasing humanisation of the practice of diplomatic protection in state practice and doctrine and at the Court itself. Scholarship has gone as far as saying that the *Mavrommatis* fiction has not only been undermined as a result of these developments but has also ceased to exist all together.[143] However, this state of affairs strongly contrasts with the absence of procedural prerogatives granted to the injured individual, who solely cooperates with the state to provide documentary evidence or, at the most, a written testimony in the form of an affidavit, attached to the government's written pleadings.

This contrast compromises the Court's procedural legitimacy in at least two ways. First, standards of democracy used to measure legitimacy are not met where injured individuals are absent in proceedings where they are directly impacted. Second, technocratic expertise is compromised where the individual's enhanced participation may have allowed for more evidence that could have facilitated the Court's tasks.

This dichotomic gap could be bridged by state litigants making space for injured individuals to make statements in their delegation or as witnesses, where feasible and relevant. Indeed, governments should consider the importance of inclusion in an increasingly interconnected international legal order with a number of actors beyond the state.

[143] Schramm (n. 85) 167; Pellet (n. 86) 1359; Pellet (n. 34).

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